

(7)
CASE NUMBER 84-231

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

ALVIN D. HOOPER AND MARY N. HOOPER,
APPELLANTS

VS.

BERNALILLO COUNTY ASSESSOR,
APPELLEE

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

REPLY BRIEF OF APPELLANTS

Alvin Dillard Hooper
Counsel of Record
1712 Pedregoso Pl., SE
Albuquerque, NM 87123
(505) 844-8900

Harold L. Folley
1743 Soplo, SE
Albuquerque, NM 87123

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This brief replies to the briefs of appellee Bernalillo County Assessor (hereinafter "Assessor"), amicus curiae State of New Mexico (hereinafter "State"), and amicus curiae American Legion, et al. (hereinafter "Legion"). Those three briefs are based on the erroneous premises and incorrect facts set forth below and consequently are of little value in clarifying the issues in this case.

- I. THE MAY 8, 1976 DATE IS NOT RATIONALLY RELATED TO THE WITHDRAWAL OF AMERICAN TROOPS FROM VIETNAM OR ANY OTHER EVENT AND RESIDENCY ON THAT DATE, OR IMMEDIATELY PRIOR THERETO, IS NOT REQUIRED.

Appellee Assessor erroneously states that the challenged May 8, 1976 date "...is one year from the date on which American troops in Vietnam were withdrawn..." and thus is directly and rationally related to that event. Appellee's Br. 2, 22.

A cursory review of public records indicates that the Vietnam cease-fire agreement was signed in Paris on January 27, 1973, and the last American troops were withdrawn from Vietnam on March 29, 1973. Agreement on Ending the War and Restoring Peace in Viet-nam, Jan. 27, 1973, 24 U.S.T. 1, §5 at 6; T.I.A.S. No. 7542, §5 at 6. See also, N.Y. Times: Jan. 24, 1973 at 1; Jan. 28, 1973 at 1; and Mar. 30, 1973 at 1, col. 1-3 (copies attached as Appendix A).

In light of the correct facts, the connection of the May 8, 1976 date to the withdrawal of troops becomes much more tenuous than appellee asserts. In short, the May 8, 1976 date is arbitrary and has no direct or rational connection to troop withdrawal or anything else which can be a legitimate basis for discriminating among resident-veterans. In its decision below,

the Court of Appeals of New Mexico relied, at least in part, on this same incorrect fact now being asserted anew by appellee. J.S. App. B 15-16.

Appellee Assessor also asserts that this statute in essence simply provides an exemption to Vietnam-era veterans who were residents of New Mexico on May 7, 1976, and the retroactive declaration of this benefit in 1983 does not make it any less valid. Appellee's Br. 20-21. This assertion and accompanying reasoning is fallacious. Section C(3)(d) of N.M. Stat. Ann. 7-37-5 requires residency at any time "...prior to...May 8, 1976...", not on May 7, 1976. Further, the declaration in 1983 of a tax exemption for those veterans who had been residents on May 7, 1976 is clearly not the same as making that same declaration on May 7, 1976. In the latter case, the State would have been making no

distinctions between its then resident-veterans, i.e., if the declaration had been made on May 7, 1976, all resident-veterans at that time would have received the benefit. However, in the actual case herein of the declaration in 1983, the State was clearly discriminating among its then bona fide resident-veterans.

Appellee Assessor next argues that the May 8, 1976 date is valid because it corresponds with similar conditions imposed on veterans of other conflicts in order to receive the tax exemption. Appellee's Br. 2, 15, 20 n. 11. See also, Amicus State's Br. 9 and Amicus Legion's Br. 3. That argument of course assumes the validity of the residency requirements for other conflicts, a matter not free from doubt. Further, the argument is not factually correct. The residency requirement set forth in N.M. Stat. Ann.

7-37-5C(3) for each other conflict was added prior to or about the time of the designated date itself and/or the designated date corresponds with the date established by Congress for determination of eligibility for certain veterans' benefits.¹ The May 8, 1976 date challenged herein has neither of these features.

¹The January 1, 1934 residency requirement for World War I veterans was enacted in 1933. 1933 N.M. Laws, ch. 44, §1. The January 1, 1947 date for World War II veterans was added in March 1947. 1947 N.M. Laws, ch. 79, §1. The January 1, 1947 date for World War II and the February 1, 1955 date for the Korean War both correspond with the dates established by Congress for determination of eligibility for certain veterans' benefits. 38 U.S.C. §101(8), (9) (1982).

II. THE CHALLENGED STATUTE DOES NOT
REQUIRE A SPECIAL NEXUS BETWEEN THE
VETERAN AND NEW MEXICO BASED ON
RESIDENCY DURING MILITARY SERVICE.

Beginning on the very first page with appellee's Question Presented and continuing throughout the brief, appellee repeatedly asserts and relies upon the erroneous premise that this challenged statute provides a tax exemption for "...veterans who resided in the State at the time of entering or leaving wartime service..." and validly denies that benefit to other veterans such as appellant. Appellee's Br. at (i), passim. Amicus curiae State and amicus curiae Legion rely on this same erroneous premise but neither appellee nor amici point to any statutory language or other support for this premise.

Even a cursory reading of N.M. Stat. Ann. § 7-37-5 (1978) shows that it requires no special nexus or relationship

between the veteran and New Mexico based on residency during military service. Rather, that statute requires that the veteran must have served "...on active duty continuously for ninety days... during a period in which the armed forces were engaged in armed conflict..." and that the veteran must have been a "...New Mexico resident prior to... May 8, 1976...." Whether that period of prior residency overlaps with, is in close proximity to, or is remote from the period of military service is immaterial. Having once established residency at any age and at any time prior to May 8, 1976, a person could have left New Mexico and resided in another state for an extended period, entered service from that other state, returned to that other state after completing service and remained there indefinitely without being denied the tax

exemption once he or she finally returned to New Mexico. Appellants' Br. 29-30, 39-40. Regardless of what the statute previously provided, or even what the legislature intended for it to provide after its amendments in 1981 and 1983, the plain language of the statute in its present form does not require a special nexus based on a coincidence of military service and residency in New Mexico. See Appellants' Br. App. A. Accordingly, appellee's and amici's complete reliance on this erroneous special-nexus premise nullifies their arguments.

Whether a special nexus based on a coincidence of military service and residency is a valid basis by itself for discriminating between bona fide resident-veterans has apparently never been addressed in an opinion by this Court and need not be addressed in this case. In

any event, that special nexus is a substantial factor not present in this challenged New Mexico statute. Thus this Court need not address appellee's Question Presented.

In reliance on the erroneous special-nexus premise, appellee argues that the statute is designed to benefit "...veterans leaving or returning to the State at times of conflict..." and to address "...the particular strains felt by servicemen as they leave, or just after they return to, civilian life." Appellee's Br. 6, 17. Appellee continues that immediately after returning, veterans "...faced problems while in New Mexico that later arrivals simply did not. By the time this latter class of veterans had migrated to New Mexico, they had already had the opportunity to readjust to civilian life...." Appellee's Br. at 18.

See also, Amicus State's Br. at 5 and Amicus Legion's Br. at 2, 3. The history of this statute clearly refutes those arguments. The previous May 8, 1975 date was not added to the statute until 1981 and the present May 8, 1976 date was not added until 1983. Appellants' Br. App. A. Thus the tax exemption was not given to the veterans who migrated to New Mexico during the May 7, 1975-May 7, 1976 period until approximately eight years after their return to civilian life. It is ludicrous to suggest that this alleged interest in helping veterans readjust to civilian life supports the retroactive selection in 1983 of the May 8, 1976 cut-off date for residency. It also is pure speculation to assume in 1983 that the veterans who arrived after May 7, 1976 would have less need for, or be less deserving of, the tax exemption than the

veterans who arrived during the May 7, 1975-May 7, 1976 period.

Appellee Assessor and amicus State assert that so long as the statute "generally" or "for the most part" serves an intended purpose, it is valid. Appellee's Br. at 18, 23 n. 15; Amicus State's Br. at 6. Such reasoning discards any concept of individual rights under the Fourteenth Amendment and would virtually immunize all legislation from any challenge that it violates equal protection or due process rights of a state citizen. A statute must be tailored for its intended purpose. There is little doubt that the statutes invalidated in Zobel v. Williams, 457 U.S. 55 (1982); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969), and numerous other cases "generally" served the purpose of

providing welfare benefits, etc., to those who needed them. Nevertheless, those statutes were invalidated because they violated constitutional rights guaranteed to any person within the jurisdiction of the state.

III. THE CHALLENGED RESIDENCY REQUIREMENT
BURDENS APPELLANTS' RIGHT TO TRAVEL
AND SHOULD BE SUBJECTED TO STRICT
SCRUTINY.

For the reasons set forth above and in their brief, pages 25-53, appellants believe the challenged residency requirement is analogous to that addressed in Zobel v. Williams, 457 U.S. 55 (1982), and like that requirement, it cannot pass even the minimum rational purpose test. However, if this Court does decide that this minimum test is passed, it should go further and subject this challenged residency requirement to strict scrutiny because of its burden on appellants' right

to travel as set forth in appellants' brief, pages 54-73.

Appellee and amici predictably argue that appellants' right to travel has not been burdened because they have not been denied a fundamental right or benefit. They read this Court's decisions as establishing an exclusive list of rights and benefits which must be denied before infringement of the right to travel can be invoked. See Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (non-emergency medical care); Dunn v. Blumstein, 405 U.S. 330 (1972) (voting rights); and Shapiro v. Thompson, 394 U.S. 618 (1969) (welfare benefits). Such rationale is nothing more than an attempt to water down the fundamental right to travel and make it synonymous with some denied benefit.

Appellee and amici also argue that a

benefit must be a substantial factor in deciding whether or not to migrate to a state before its denial would unconstitutionally burden the right to travel. Appellee's Br. 10-11, 13; Amicus State's Br. 3, 5; Amicus Legion's Br. 4. That is nothing more than another face of the contention that deterrence is required. That contention is not supportable. See Appellants' Br. 61-62.

The argument that the tax exemption could be withdrawn at any time and thus its denial does not impose a penalty is not worthy of consideration. Amicus State's Br. 5. The same argument appears equally applicable, and equally nonpersuasive, with respect to the welfare benefits in Shapiro, the medical care in Memorial Hospital, and the dividend in Zobel. The penalty on the right to travel arises from discriminatory distribution of

a benefit based solely upon the time of exercising that fundamental right, not on whether the benefit is provided at all. See Appellants' Br. 60-61.

The challenged residency requirement divides New Mexico's resident Vietnam-era veterans into two classes, indistinguishable from each other except that one is composed of veterans who resided in the State at some time before May 8, 1976, and the other is composed of veterans such as Hooper who did not have such prior residence. See Shapiro v. Thompson, 394 U.S. at 627. It is clear that the right to travel of the latter class has been burdened because they have been disadvantaged and relegated to second-class citizenship status as compared with the former class solely because of the date of exercise of that right. Zobel v. Williams, 457 U.S. at 60 n. 6. This

burden calls for strict scrutiny by this Court of the residency requirement creating the disadvantage. See Appellants' Br. 59-68. This residency requirement cannot withstand even minimal scrutiny. A fortiori, it cannot withstand strict scrutiny.

IV. THE REQUIREMENT OF RESIDENCY PRIOR TO MAY 8, 1976 CAN BE SEVERED FROM THE REMAINDER OF THE STATUTE BY THIS COURT.

Appellee Assessor incorrectly states the New Mexico law regarding severability. Compare appellee's brief, page 25, note 18, subparagraph (3) with the third test set forth in State v. Spearman, 84 N.M. 366, 368, 503 P.2d 649, 651 (Ct. App. 1972). Appellants' Br. 86-87. Appellee's incorrect statement of the law would in essence place the burden on appellants herein to show that the New Mexico legislature would have passed the statute

had it known of the invalidity of the objectionable part. Amici echo this incorrect statement. Amicus State's Br. 9; Amicus Legion's Br. 6. The New Mexico rule for severability as set forth in Spearman clearly places the burden on appellee herein to refute severability by showing that the legislature would not have passed the statute had it known of the invalidity of the May 8, 1976 date. Appellee has not, and cannot, meet that burden.

The fact that New Mexico law may govern the issue of severability of the invalid residency requirement does not mean that this Court should abstain from making that decision. The New Mexico law on severability is clear and needs no further interpretation by the New Mexico courts. Appellants' Br. 84-88. The New Mexico law remains only to be applied, not

interpreted. Thus there are no special circumstances which would justify the delay and expense to the Hoopers which would result from this Court declining to decide the severability of the residency requirement if it is found invalid. Kusper v. Pontikes, 414 U.S. 51, 54 (1973).

CONCLUSION

For the foregoing reasons and those set forth in appellants' brief,, the relief previously requested by appellants on pages 89-90 of that brief should be granted.

Respectfully submitted,

Alvin Dillard Hooper
Counsel of Record
1712 Pedregoso Pl., SE
Albuquerque, NM 87123
(505) 844-8900

Harold L. Folley
1743 Soplo, SE
Albuquerque, NM 87123

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The New York Times

LATE CITY EDITION

Published: Forty times, daily, except
Sundays, except on public holidays.
Times except on public holidays.
Printed at the New York Times Building,
60-61, 62-63, 64-65, 66-67, 68-69, 70-71, 72-73, 74-75, 76-77, 78-79, 80-81, 82-83, 84-85, 86-87, 88-89, 90-91, 92-93, 94-95, 96-97, 98-99, 100-101, 102-103, 104-105, 106-107, 108-109, 110-111, 112-113, 114-115, 116-117, 118-119, 120-121, 122-123, 124-125, 126-127, 128-129, 130-131, 132-133, 134-135, 136-137, 138-139, 140-141, 142-143, 144-145, 146-147, 148-149, 150-151, 152-153, 154-155, 156-157, 158-159, 160-161, 162-163, 164-165, 166-167, 168-169, 170-171, 172-173, 174-175, 176-177, 178-179, 180-181, 182-183, 184-185, 186-187, 188-189, 190-191, 192-193, 194-195, 196-197, 198-199, 200-201, 202-203, 204-205, 206-207, 208-209, 210-211, 212-213, 214-215, 216-217, 218-219, 220-221, 222-223, 224-225, 226-227, 228-229, 230-231, 232-233, 234-235, 236-237, 238-239, 240-241, 242-243, 244-245, 246-247, 248-249, 250-251, 252-253, 254-255, 256-257, 258-259, 260-261, 262-263, 264-265, 266-267, 268-269, 270-271, 272-273, 274-275, 276-277, 278-279, 280-281, 282-283, 284-285, 286-287, 288-289, 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"All the News
That's Fit to Print"

The New York Times

LATE CITY EDITION
Monday, Jan. 22, 1973
Times Square, New York City
Vol. 100, No. 42,200
50 CENTS

VOL. CXXII, No. 42,200

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NEW YORK, SUNDAY, JANUARY 22, 1973

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VIETNAM PEACE PACTS SIGNED; AMERICA'S LONGEST WAR HALTS

Nation Ends Draft, Turns to Volunteers

Change Is Ordered Six Months Early—
Youths Must Still Register

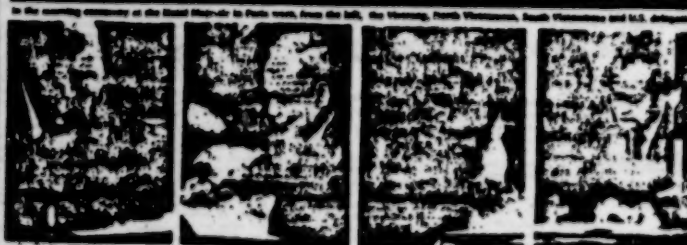
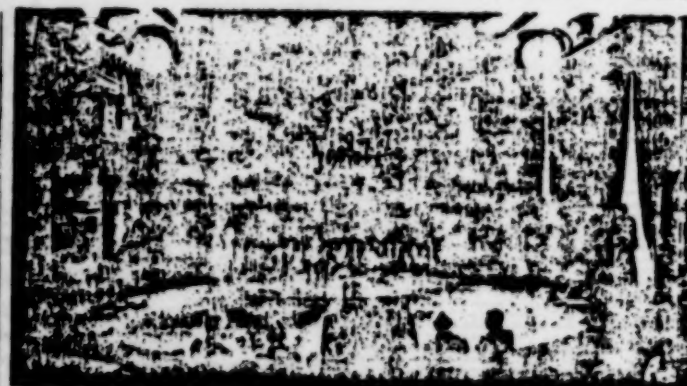
By DAVID S. GOODMAN
Special to The New York Times

WASHINGTON, Jan. 22—The draft when they were 18, the young men of America will no longer be required to register for military service, but they will still have to register for the draft.

As a result of the agreement, the draft will be ended in 1973, and the young men will be able to register for the draft at a later date. The draft will be ended in 1973, and the young men will be able to register for the draft at a later date.

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Message from the President of the United States, signed by Richard M. Nixon, is shown in the top right corner of the page. The message is dated January 22, 1973, and is addressed to the people of the United States. It announces the signing of the peace agreements with North and South Vietnam, and the end of the draft.



Signing from left, William P. Rogers for U.S., Nguyen Tay Vinh for North, and Nguyen Thi Dinh for the South. (The New York Times for Saigon)

CEREMONIES COOL

Two Sessions in Paris
Formally Conclude
the Agreement

By FRANK L. RYAN
Special to The New York Times

PARIS, Jan. 22—The two-day peace talks in Paris formally concluded the agreement between the United States and North and South Vietnam. The talks were held in a series of sessions over the past several days, and the agreement was signed at the end of the second session.

The agreement calls for a ceasefire and the withdrawal of American troops from Vietnam. It also calls for the release of prisoners of war and the reunification of Vietnam.

The talks were held in a series of sessions over the past several days, and the agreement was signed at the end of the second session.

Hanoi Lists of P.O.W.'s
Are Made Public by U.S.

The Toll: 12 Years of War
Military
United States—15,523 killed, 58,500 wounded, 507
missing (up to Jan. 13, 1973)

BATTLES CONTINUE
AFTER CEASE-FIRE

"All the News
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The New York Times

LATE CITY EDITION

Monday, March 10, 1972
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Subscription rates: \$12.00 per year in advance.
Single copies: 10¢ each.

VOL. CXXII, No. 42,265

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U.S. Forces Out of Vietnam; Hanoi Frees the Last P.O.W.



U.S. Forces Out of Vietnam; Hanoi Frees the Last P.O.W.

By JAMES H. HOGAN
WASHINGTON, March 10—President Nixon today announced that the United States would withdraw its last combat troops from Vietnam by the end of the year. He also announced that the North Vietnamese had agreed to release the last American prisoner of war, a Marine who had been held in captivity for more than 17 years.

The president's announcement came in a speech to the nation from the White House. He said that the decision to withdraw troops was a result of the Paris Peace Accords, which were signed in January 1973. He said that the United States would continue to provide military aid to South Vietnam, but that it would not send more troops.

The release of the last P.O.W. was also announced. The man, a Marine named John S. Sweeney, was held in captivity for more than 17 years. He was released on the condition that he would not return to the United States for a period of five years.

Thousands Watch 67 Prisoners Depart

Thousands of people gathered in Hanoi today to watch the departure of 67 American prisoners of war. The prisoners were being released by the North Vietnamese government. The release was the result of a series of negotiations between the United States and the North Vietnamese government.

PRESIDENT WARNS HANOI TO COMPLY WITH TRUCE PACT

He said the threat of U.S. retaliation against North Vietnam was a constant possibility.

By JAMES HOGAN
WASHINGTON, March 10—President Nixon today warned the North Vietnamese government that the United States would retaliate against any violation of the Paris Peace Accords.

He said that the United States would continue to provide military aid to South Vietnam, but that it would not send more troops.

The president's warning came in a speech to the nation from the White House. He said that the United States would continue to provide military aid to South Vietnam, but that it would not send more troops.

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NIXON SETS MEAT PRICE CEILINGS AT BOTH WHOLESALE AND RETAIL; ASSERTS COSTS 'SHOULD GO DOWN'

McCord Testifies His Fellow Plotters
Linked High Nixon Aides to Watergate

He Warns Ask Authority
to Cut or Suspend
Food Import Curbs

By JAMES HOGAN
WASHINGTON, March 10—President Nixon today announced that he had set price ceilings on meat at both wholesale and retail levels. He said that the ceilings were necessary to control inflation.

He said that the ceilings would be in effect until the end of the year. He said that the United States would continue to provide military aid to South Vietnam, but that it would not send more troops.

The president's announcement came in a speech to the nation from the White House. He said that the United States would continue to provide military aid to South Vietnam, but that it would not send more troops.

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